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# The Gig Economy and the Future of Work

Malcolm Sargeant<sup>1</sup>

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**Abstract Purpose.** The purpose of this paper is to consider the development of the so-called gig economy and to show that really the developments in the labour market are really just a development of an increase in contingent work generally.

**Design/methodology/approach.** The paper analyses relevant literature and statistical information, together with the issues raised by litigation in relation to the employment status of workers employed in the developing gig economy.

**Findings.** The paper is part of a wider literature on the development of the gig economy and hopefully contributes to current analysis and debate on employment status on 'new forms of work'.

**Research limitations/implications.** The research is part of a debate adding a legal perspective.

**Originality/value.** The paper provides further material for an ongoing discussion about how new are new forms of work.

**Paper type.** Issues paper

**Keywords:** *The Gig Economy, Vulnerable Workers, The Future of Work.*

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## 1. Introduction

Full-time open ended contracts of employment are the most prevalent types of contract in the workplace in the EU (apart from the Netherlands). This standard form of employment accounts for some 59% of all contracts although this figure is declining (from 62% a year earlier). There has been a corresponding growth in more ‘flexible’ forms of employment and it is possible that these flexible forms will become the norm in the future<sup>2</sup>. The number of self-employed workers has increased significantly and there are now more than one million more people in self-employment compared to 2006<sup>3</sup>. Here we consider the so-called gig economy, from a UK perspective, and place it within the context of precarious work and show that it is not a new phenomenon but a variation of the increasing flexibility of the labour market.

### What is the gig economy?

Any discussion of the gig economy seems to demand at the start that we discuss what the term actually means. At its simplest it means that the nature of work is different to the conventional standard view that jobs consist of open ended contracts of employment where people work regular hours and are paid at a regular rate. In this new economy, those who work in it carry out a series of ‘gigs’, i.e. one off jobs, in order to create an income. This must mean that they are either self-employed working perhaps for a number of employers or that they are employed on a series of employed contracts and are employees during their working periods. In either case they are to be paid for a particular task or tasks, rather than receive a guaranteed income.

A research report by the Chartered Institute for Personnel and Development (CIPD) defined it as ‘a way of working that is based on people having temporary jobs or doing separate pieces of work, each paid separately, rather than working for an employer’<sup>4</sup>. Of course large numbers of people have been working in this way for very many years, so it is not offering a definition of any new form of working.

The House of Commons Business, Energy and Industrial Strategy Committee carried out an enquiry into the future world of work,

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<sup>2</sup> DG for Internal Policies *Precarious employment in Europe; Part 1: Patterns, Trends and Policy Strategy A study for the Employment and Social Affairs Committee* (2016).

<sup>3</sup> *Living on the Edge: The rise of job insecurity in modern Britain* TUC (December 2016).

<sup>4</sup> CIPD *To gig or not to gig? Stories from the modern economy Survey report* (March 2017).



focussing on its rapidly changing nature, and the status and rights of agency workers, the self-employed, and those working in the 'gig economy'<sup>5</sup>. Two businesses in the gig economy, in their submission to the Committee, offered their own definitions. Firstly, Deliveroo stated in its written submission that:

Deliveroo is a British tech business, founded in London in 2013. Our online delivery platform joins up customers who want great food, restaurants who seek incremental revenue and riders looking for flexible work. Customers order via our app from one of our partner restaurants, the vast majority of whom had never even considered deliveries before. Riders collect the prepared food and deliver it to the customer by bicycle or scooter. We operate in over 70 towns and cities in the UK, employing over 600 software engineers and employees in our UK headquarters, working with more than 7,000 partner restaurants across the country and engaging with over 10,000 people as riders.

Secondly Uber, in its submission, stated that

Uber is a technology company with a simple mission: to make affordable transportation available everywhere. Uber launched in London in 2012, and today connects riders and drivers in more than 25 towns and cities across the UK. Over 40,000 drivers in the UK use the Uber app to earn money each month.

They both describe themselves as technology companies and not as a delivery or a taxi business. If this were really true then one might argue that there is some merit to the idea that the 10,000 riders delivering restaurant food and the 40,000 individuals working as taxi drivers are all independent entrepreneurs operating as self-employed business people. This is the essence of the gig economy. It refers to people who are viewed as working as independent businesses carrying out a series of jobs 'and using a digital platform operated by a large company to match them to customers'<sup>6</sup>. A report by the Institute for Fiscal Studies<sup>7</sup> stated that there was no clear way to decide which jobs were part of the gig economy, 'but one of the characteristic features is the use of third-party digital

<sup>5</sup> <http://www.parliament.uk/business/committees/committees-a-z/commons-select/business-energy-industrial-strategy/news-parliament-2015/the-future-world-of-work-and-rights-of-workers-launch-16-17/>.

<sup>6</sup> Adam, Stuart. Miller, Helen and Pope, Thomas *Tax, legal form and the gig economy* Institute for Fiscal Studies (2017).

<sup>7</sup> Ibid.



platforms'. These are provided by companies that provide a web based platform which enables those selling their services to be linked with customers wishing to buy those services.

The wider context is described by Professor Orly Lobel when she says that we should examine it in the context of the World Wide Web's genealogy. She suggests that we are now in the third phase of the internet. The first phase was about enabling searching and accessing information (1.0); the second phase was about selling things (2.0) and now the third phase (3.0) includes the selling of 'labor, effort, skills and time'<sup>8</sup>. The development of this technology, which enables a gig economy, is also reliant upon a pool of workers willing to work under this regime. A further study of independent work for the McKinsey Global Institute<sup>9</sup> identified three key features of this work. Firstly, a high degree of autonomy for workers in deciding their workload and work portfolio; secondly, payment by task, assignment or sales, meaning that they are not paid for time not spent working; and, thirdly, the short-term relationship between the worker and the customer. Thus we have a picture of a large group of independent workers benefitting from new technology supported by large corporations who provide the platforms on which the workers rely. There are, however, differing views of these developments. On the one hand there is technology which empowers people to sell their skills in an alternative way to just getting a 'permanent' job. Alternatively, 'others see it as using new technologies to sustain business models based on old-fashioned exploitative employment relationships, which minimise obligations to workers and drive down hourly pay'<sup>10</sup>.

### Precarious work and vulnerability

Contingency working is not something new and the idea that 'gig' type work is a new phenomenon is just fanciful. It can probably be said that precarious forms of work have almost always been present in systems of

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<sup>8</sup> Lobel, Orly, *The Gig Economy & The Future of Employment and Labor Law* (2016). *University of San Francisco Law Review*, *Forthcoming*; San Diego Legal Studies Paper No. 16-223. Available at SSRN: <https://ssrn.com/abstract=2848456>.

<sup>9</sup> Manyika, James. Lund, Susan, Bughin, Jaques. Robinson, Kelsey. Mishke, Jan and Mahajan, Deepa. *Independent Work: Choice, Necessity, and the Gig Economy* McKinsey Global Institute (October 2016).

<sup>10</sup> Written evidence from the Chartered Institute of Personnel and Development (CIPD) (WOW0098) to the House of Commons Business, Energy and Industrial Strategy Committee who carried out an enquiry into the future world of work', see n. 3.

wage employment (Rodgers, 1989)<sup>11</sup>. Definitions offered concerning the scope of the work usually include many of those in precarious types of employment which has existed probably long before the invention of the standard full-time open ended contract of employment. What is new about the gig economy is the development of technology which enables companies to claim not to employ those that work for them. It creates a pseudo employment market where workers are said to be independent self-employed receiving work from and providing services via a digital platform created by the company.

The issues of concern with precarious working relate to those on low incomes or who are liable to exploitation. The characteristics of precarious working appear to be, firstly, instability, i.e. short term horizons or when the risk of job loss is high; secondly, insecurity, i.e. the lack of control (individually or collectively) over working conditions, wage, or pace of work; thirdly, lack of protection in employment and social security (stipulated either by law, collective organisation or custom and practice); and lastly, social or economic vulnerability which is associated with low income resulting in poverty and insecurity<sup>12</sup>. There is an element of these characteristics in all freelance or 'gig' work, but it probably applies more to those that do low level work and those who cannot obtain any other sort of work, rather than those who choose this path to develop a professional practice.

The Trades Union Congress (TUC), in a 2016 Report titled *Living on the Edge*, focussed on an alternative view within the context of precarious working and insecure work. The report is concerned with the growth of insecure working, which includes the gig economy but its concern is with those who primarily are in this low level work. The TUC estimated that one in ten workers, or 3.2 million people, face insecurity at work, either because they are on a zero-hours contract, or a temporary contract that offers them little protection at work, or because they are engaged in low paid self-employment<sup>13</sup>. This last group is estimated to make up some 5% of all those in work. The Report also highlights a pay penalty for being in

<sup>11</sup> Rodgers G (1989) Precarious Work in Western Europe: The State of the Debate. In: Rodgers G and Rodgers J (eds.) *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe*. Geneva: International Institute for Labour Studies; Free University of Brussels.

<sup>12</sup> Rodgers, Gerry *Precarious jobs in labour market regulation: the growth of atypical employment in Western Europe* International Institute for Labour Studies (1989). See also Kalleberg, Arne L, *Measuring Precarious Work*; A Working Paper of the Einet Measurement Group (November 2014).

<sup>13</sup> TUC *Living on the Edge: The rise of job insecurity in modern Britain* (December 2016).

insecure work and particularly for the self-employed. They cited research by the Social Market Foundation<sup>14</sup> which showed that 45 per cent of the self-employed, or 1.7 million people, are low paid, that is paid below the level of the government set National Living Wage.

## 2. The size of the gig economy

Estimates of the size of the gig economy are confusing and contradictory, partly because of disagreement over which jobs are relevant. Contingent working is not a recent phenomenon and has certainly been around long before the coming of the digital platform which is the basis of the 'Uber model' of carrying out business. The important characteristic of this model is, however, the carrying out of that business by large numbers of people who are treated as being self-employed. At the beginning of 2017 the UK Office for National Statistics estimated that there were some 4.8 million self-employed in the UK (this compares to 26.8 million employees). Of these some 3.4 million were working full-time and the rest were working part-time<sup>15</sup>. The total figure represented a 3.2% increase on the previous year, i.e. an increase of 148,000 in the self-employed in one year. Almost 9% of the self-employed worked for less than 16 hours per week (the great majority being female) and, interestingly, over 28% worked for more than 45 hours per week (35% of male self-employed and 15% of female self-employed). This compared to 19% of those in employment who worked for more than 45 hours per week.

The McKinsey Global Institute carried out a survey of 8000 respondents in 6 countries (the United States, the United Kingdom, Germany, Sweden, France and Spain) concerning independent work<sup>16</sup>. Their results estimate that some 20 to 30 per cent of the working age population in the US and the EU15 countries were engaged in some form of independent earning. This included some 10-15 per cent of the working age population that relied upon independent work for their primary income and another 10-15 per cent reliant upon it for supplemental income. There is an issue here about definitions of independent work, but it is clear that significant numbers of people can be classified as independent workers. The report

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<sup>14</sup> Broughton, Nida and Richards, Ben (2016) *Tough Gig: low paid self-employment in the UK and London*, Social Market Foundation <http://www.smf.co.uk/wp-content/uploads/2016/03/SocialMarket-Foundation-Tough-Gig-Low-paid-self-employment-in-London-and-the-UK-FINAL-Embargoed-0001-210316.pdf>.

<sup>15</sup> Office for National Statistics *UK Labour Market March 2017*.

<sup>16</sup> Manyika et al n 7.

also makes two further important points. Firstly, that independent work is not dominated by the young. Those aged under 25 years represent less than one quarter of independent workers. Secondly, independent work is not just about low income workers. Although they estimate that 40-55 per cent of low-income households engage in independent work, they make up less than 25 per cent of all independent earners (except in Spain). It is also, they point out, the preferred method of working for many professionals. This last point is important when considering the size of the gig economy, particularly as much of the focus has been on the lower end of the employment market. The CIPD, in its analysis<sup>17</sup>, showed that over 70% of the increase in employment since 2010 had been in the top three more highly skilled occupational groups.

What the CIPD research<sup>18</sup> shows, however, is that the majority of those working in the gig economy are second jobbers. Only a quarter of their survey participants stated that gig economy type work was their main employment and about 50% had been involved for one year or less. Yet second jobbing as a feature of employment has not grown overall in recent years. As Adam et al (2017)<sup>19</sup> point out, more or less the same proportion of employees had second jobs in 2015–16 (3.5%) as in 2007–08 (3.7%). They also point out of course that the size of the labour force has increased during this period so the actual numbers involved will have increased. There has also been a small growth in the proportion of individuals who work for their own business as a second job and that the proportion who work in a second job as an employee has fallen slightly in this period.

A different focus might be to concentrate on those who are self-employed but with no employees as it is some of this group upon whom the public and legal discussion has taken place. Interestingly a BIS survey found that when those without employees were asked what was the main reason for this, almost half said they had never thought about it or felt it wasn't relevant to them. The same analysis found that some 10% stated that they worked solely for a single client<sup>20</sup>. The OECD<sup>21</sup> has estimates for this group. It defines these individuals as people whose primary activity is self-

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<sup>17</sup> See no. 8.

<sup>18</sup> CIPD n 2.

<sup>19</sup> Adams et al. n 4.

<sup>20</sup> Department for Business, Innovation and Skills *Understanding self-employment BIS Enterprise Analysis research report* (2015).

<sup>21</sup> OECD (2017), Self-employed without employees (indicator). doi: 10.1787/5d5d0d63-en (Accessed on 21 March 2017).

employment and do not employ others. They also state that the incorporated self-employed are only partly or non-included in the counts of self-employed in some of the countries in its analysis). The OECD estimate was that 11.6% of all male workers in OECD countries fell into the category of the self-employed without employees. The figure for the UK was 14.2% of male workers; for the US it was 8.1% and the rest ranged from lows of 5% for Luxembourg and 5.5% for Japan to 26.7% for Greece. For female workers the OECD average was 7.9% with 8.2% in the UK and 5.7% in the US. Here the rest ranged from a low of 2.9% in Japan to 21.2% in Mexico. For Europe the EU estimates that some 10% of workers are in this category and has only increased by about 1% over the last decade<sup>22</sup>. This EU report describes the gig economy as that part which is online, i.e. the carrying out of individual tasks and commissions online.

### 3. Employment status

In *Aslam and Farrar v Uber B.V.*<sup>23</sup>, at the Employment Tribunal, the claimants argued that the written terms between Uber and themselves should be read sceptically. They argued that the terms misrepresented the relationship and that in reality they worked for Uber and that they therefore fell within the definition found in ERA S230(3)(b) and were to be regarded as workers (para 83). Uber argued that this was not the case and that the terms reflected the reality of their relationship with the drivers. The fact that Uber makes and enforces rules about the way in which drivers may make use of the platform was ‘unremarkable and unexceptional’ (para 84). The Tribunal cited a US case<sup>24</sup> involving Uber which rejected the company’s claim that it was a technology company and not a transport one. The judgment stated (para 89) that ‘Uber does not simply sell software; it sells rides. Uber is no more a technology company than Yellow Cab is a technology company...’.

In a lengthy analysis the Employment Tribunal rejected all of Uber’s claims, stating that ‘it is plain to us that the agreement between the parties is to be located in the field of dependent work relationships’ (para 94). All the authorities relied upon by Uber were rejected. They argued that the contract for the provision of transport services was between the driver

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<sup>22</sup> DG for Internal Policies; n 1.

<sup>23</sup> We use the term Uber to apply to all the entities who were responding to the claim.

<sup>24</sup> *Douglas O’Connor v Uber Technologies Inc Case 13-cv-032460EMC* March 2015.

and the user and not between Uber and the driver. This extract from para 91 of the reasons shows this scepticism:

Uber's case is that the driver enters into a binding agreement with a person whose identity he does not know (and will never know) and who does not know and will never know his identity, to undertake a journey to a destination not told to him until the journey begins, by a route prescribed by a stranger to the contract (UBV) from which he is not free to depart (at least not without risk), for a fee which (a) is set by the stranger, and (b) is not known by the passenger (who is told only the total to be paid); (c) is calculated by the stranger (as a percentage of the total sum) and (d) is paid to the stranger.

The Tribunal stated that the Respondent's general case did not correspond with the practical reality (para 90). In its notice of appeal Uber disputed this and stated that there was 'no proper lawful basis for such a wholesale rejection of the written contracts' (para 11).

A similar Employment Tribunal claim is being made on behalf of drivers who work for Deliveroo. Leigh Day, the solicitors putting the claim together, state on their website<sup>25</sup> that:

Deliveroo riders are recruited by Deliveroo, a process which involves an interview, a trial shift and online tests, they are required to wear a Deliveroo-branded uniform and to use a Deliveroo branded box, they are given very specific instructions about how and where they work, they are subject to performance reviews and their terms and rate of pay are determined by Deliveroo.

They will be arguing that the riders are not self-employed and ought to be classified as workers and thus entitled to some employment protection measures.

If we confine our definition of the gig economy to those sectors using new technology to provide a digital platform for putting together service providers and service recipients, then we can focus on a narrower group than many other definitions provide and a group of workers who are in a new and potentially unique situation. This is a type of working relationship which enables people to enter and leave the employment market with apparent relative ease and, in particular, can facilitate part time and casual working possibly as second jobs or a way of supplementing income. These workers are usually treated as self-employed

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<sup>25</sup> <https://www.leighday.co.uk/News/News-2017/March-2017/Deliveroo-faces-legal-action-over-holiday-pay.-min.>

and, for some, this will be the preferred form of employment status when doing this work. The arguments about whether such workers should be classified as employees, workers or self-employed obscure, perhaps, the fact that there is a great variety in the way that people participate in this form of work. The CIPD (2017) survey<sup>26</sup> showed that almost a third of their respondents were working in the gig economy to boost their overall income and quarter were working to achieve a short-term goal, such as buying a car or going on holiday. In other words, it is not their primary employment for income purposes. It is also relevant that younger workers are more likely to cite these reasons than older ones (35% of under 18-29s compared to 16% of 30-59 year olds). It perhaps is too simplistic to say that one employment status should apply to all individuals in this economy and many may be happy to continue on a self-employed status. The same CIPD survey report also cited a US survey of 3000 American workers by Penn Schoen Berland published in 2016 which showed a split between those who preferred the security and benefits of working for a traditional company or the independence and flexibility that came from the on-demand approach<sup>27</sup>.

Uber, in their written evidence to the House of Commons Committee<sup>28</sup> argued in favour of this flexibility:

Over 40,000 drivers in the UK use the Uber app to earn money each month [...] This preference for independence is also revealed in how drivers use the app, which allows drivers to log in or out when and where they choose. Just 21% of drivers drive set themselves a fixed amount of hours, while 34% decide how many hours to drive depending on what else they have going on. Another 32% of these drivers set an earning goal for a given day, week or month and drive until they hit that goal. And 12% decide to drive on the spur of the moment, turning the app on whenever they choose. Internal Uber data shows that 23% of drivers in the UK are logged into the app for 10 hours or less each week, and 25% are logged in for 40 hours or more each week.

Deliveroo, in their submission, argued the same case:

The growth of a new on-demand economy in the UK has created new on-demand work. The flexible arrangements that Deliveroo offers

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<sup>26</sup> CIPD n 2.

<sup>27</sup> The on-Demand Economy Survey: <http://www.burson-marsteller.com/what-we-do/our-thinking/on-demand/ondemand/>.

<sup>28</sup> No. 3



appeal to individuals looking to work in a way which fits around their other commitments. Riders at Deliveroo work on average around 15 hours per week, and the vast majority are aged under 25. Many of them are students looking to earn money in a way which fits around their studies, others work with Deliveroo to supplement their income or alongside other personal commitments.

Perhaps supporting the arguments of gig economy employers, the self-employed are now more likely than employees to work part-time (31% of the self-employed compared with 26% of employees worked part-time)<sup>29</sup>.

In 2015 Uber, in the US, partnered research on how working on the platform impacted on drivers. This included a survey of several hundred drivers. Professor Alan Krueger, who carried out the research, concluded that most Uber drivers had joined the platform not because of the absence of other job opportunities, but because of the flexibility and rewards that the platform offered<sup>30</sup>. The majority of Uber drivers were employed, either on a full time or a part-time basis, elsewhere. Flexible working appealed more than the standard forms of employment.

The arguments in the cases so far reported are about whether these workers should be classified as self-employed or fall into the category of 'workers'. This latter category recognises that there is an employment relationship that falls between that of 'employee' and that of someone who is genuinely self-employed. This is provided for in section 230(3)(b) Employment Rights Act 1996 which states that a worker can be someone working under a contract 'whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'. The only way that an individual can establish that they fall into the category of worker or employee is to challenge their current classification before the court. The court will consider the reality of the contractual relationship between the parties, e.g. the Employment Tribunal<sup>31</sup>, when considering the case against Uber accused the firm of 'resorting in its documentation to fictions, twisted language and even brand new terminology' and even quoted Hamlet to suggest that the group's UK

<sup>29</sup> Adam Stuart; n. 4.

<sup>30</sup> See Beat The Press, *Ubernomics*, CTR. FOR ECON. & PUB. POL'Y (Jan. 23, 2015), <http://www.cepr.net/index.php/blogs/beat-the-press/ubernomics> which criticises some of Professor Kreg's conclusions; cited in Lobel, Orly, *The Gig Economy & The Future of Employment and Labor Law* (2016). *University of San Francisco Law Review*.

<sup>31</sup> Case numbers 2202551/2015 *Y. Aslam and J. Farrar v Uber B.V.*

boss was protesting too much about its position. The judges stated further that '(T)he notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is to our minds faintly ridiculous'.

#### 4. Conclusion

Establishing the correct employment status is important as differing employment protections apply to each category. Workers, who are not employees, have the right to: the National Minimum Wage (or National Living Wage); protection against unlawful deductions from wages; paid annual leave; the statutory minimum length of rest break; protection from accidents at work; not work more than 48 hours on average per week; protection against unlawful discrimination; some protections for pregnant workers; protection for whistleblowing; not be discriminated against if working part-time; join a trade union and be accompanied in grievances and disciplinary actions<sup>32</sup>. All these rights plus other are enjoyed by 'employees'. The self-employed, however, just benefit from some provisions on health and safety and protection from discrimination. It is the search for these additional protections which lead to challenges of false self-employment.

This issue is not a new one and is not a result of the gig economy, although this puts a new argument when the companies claim not to be employers but technology companies. The issue of misclassification of employment status has been around a long time and the gig economy employers are just a further complication in a process which lacks precise definitions and requires fine judgments. Indeed it can also be said that 'non-standard employment is an evolving concept' and that this 'may reflect attempts by employers to structure working relationships differently to avoid regulation' or it 'may reflect generational aspirations and requirements to life and work or both'<sup>33</sup>.

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<sup>32</sup> TUC - <https://www.tuc.org.uk/employment-status-and-rights>.

<sup>33</sup> Written evidence from the Employment Lawyers Association (WOW76) to the House of Commons Business, Energy and Industrial Strategy Committee who carried out an enquiry into the future world of work', see n. 3.

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